STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK HILLS, JR.,

Defendant-Appellant.

UNPUBLISHED
September 18, 1998

No. 196784
Detroit Recorder's Court
LC No. 95-005790

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions on two counts of embezzlement over $100, MCL 750.174; MSA 28.371. The trial judge sentenced defendant, a fourth habitual offender, to an enhanced term of seven to twenty years' imprisonment. MCL 769.12; MSA 28.1084. We affirm.

Defendant first contends that he was denied a fair trial because the prosecutor failed to inform him until the first day of trial that a prosecution witness was granted immunity. We disagree. We review constitutional issues de novo on appeal. *In re Parole of Glover*, 226 Mich App 655, 671; 575 NW2d 772 (1997), lv gtd 458 Mich 866 (1998).

When a witness testifies at trial pursuant to a plea bargain or a grant of immunity from the prosecution, the prosecutor owes the defendant a duty to disclose the details of the agreement. *People v Cadle*, 204 Mich App 646, 654; 516 NW2d 520, remanded on other grounds 447 Mich 1009; 526 NW2d 918 (1994), on remand 209 Mich App 467; 531 NW2d 761 (1995). This disclosure requirement enables the trier of fact to assess a witness' credibility in light of its knowledge of a possible motive for the witness to fabricate. *People v Atkins*, 397 Mich 163, 174; 243 NW2d 292 (1976). However, the prosecutor's suppression of this information, even after a defendant has specifically requested it, does not warrant reversal of the defendant's conviction unless "the suppressed evidence might have affected the outcome of the trial." *People v Carter*, 415 Mich 558, 594; 330 NW2d 314 (1982), quoting *United States v Agurs*, 427 US 97, 104; 96 S Ct 2392; 49 L Ed 2d 342 (1976); *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992).

Although the prosecutor failed to timely inform defendant that one prosecution witness was testifying pursuant to a deal granting him immunity, this failure did not constitute error requiring reversal. Defendant requested and the trial court on October 17, 1995 ordered that the prosecutor apprise defense counsel of any inducements he had made to prosecution witnesses in order to secure their testimony. At trial, the prosecutor called three witnesses to testify against defendant. One of these witnesses, John Travis, had purchased from defendant snowplow blades that defendant embezzled from his employer. Travis was testifying against defendant pursuant to a grant of immunity from the prosecutor. The prosecutor did not inform defense counsel of his agreement with Travis until March 7, 1996, the day defendant's trial began. However, because the record indicates that defense counsel on cross-examination succeeded in eliciting from Travis that a grant of immunity existed, thus establishing on the record a potential motive for Travis to fabricate testimony, we conclude that the prosecutor's violation of the discovery order did not affect the trial's outcome.

Defendant next argues that the trial court erred in denying his motion for a new trial because the prosecutor improperly coached a witness during trial. We disagree. We review a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997).

In support of his motion, defendant submitted the affidavits of six trial attendees who all stated that they sat behind the prosecutor and saw him nodding his head to suggest answers to Travis during defense counsel's cross-examination of Travis. None of these affidavits alleged exactly when this coaching took place or that the coaching caused Travis to alter his testimony. The trial court found that no coaching had occurred, and denied defendant's motion for new trial. Unless the trial court clearly erred in finding that no coaching occurred, we may not contradict its conclusion. MCR 2.613(C).

Defendant has not shown that the trial court clearly erred. At all times during defense counsel's cross-examination, the trial court was able to observe the prosecutor's face from the bench. The trial court noted, and defendant conceded, that the affiants were all seated behind the prosecutor. To the extent that the affiants' allegations of coaching conflicted with the trial court's observations, the court found that their statements lacked credibility. In light of the trial court's observations that no coaching took place and the fact that the trial court occupied the better position from which to observe the prosecutor's behavior, we cannot conclude that the trial court clearly erred in concluding that no coaching occurred. The trial court did not abuse its discretion in denying defendant's motion for new trial.

Defendant alleges third that the prosecutor failed to present sufficient evidence to support his embezzlement convictions. We disagree. In determining whether sufficient evidence to support a conviction was presented at trial, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Parcha*, 227 Mich App 236, 238-239; 575 NW2d 316 (1997). This Court has defined the crime of embezzlement in terms of the following elements:

> (A) the money or personal property in question must belong to the principal; (B) the defendant must have had a relationship of trust with the principal because he was an agent, servant, employee, trustee, bailee or custodian of the principal; (C) the money or personal property in question must have come into the defendant's possession or under his charge or control because of that relationship of trust with the principal; (D) the money or personal property must have been dishonestly disposed of or converted to the defendant's own use, or taken or secreted with intent to convert to his own use without the consent of his principal; (E) this act must have been done without the consent of the principal; and (F) at the time of the conversion or appropriation to his own use the defendant must have intended to defraud or cheat the principal of some property. [*People v Wood*, 182 Mich App 50, 53; 451 NW2d 563 (1990).]

Defendant argues specifically that the prosecutor failed to produce sufficient evidence that he had control over the snowplow blades that were taken from his employer, F.L. Jursik Company (Jursik), via his employment as a parts-counter person, and that the prosecutor also failed to show that the snowplow blades that defendant allegedly converted had belonged to his employer. Regarding defendant's control over Jursik's inventory, the company's former branch manager testified that the duties of defendant's position as a parts-counter person included going to the company's warehouse and securing merchandise pursuant to customer orders. A jury could have reasonably concluded on the basis of this testimony that defendant's employment relationship afforded him control over the warehouse inventory. The jury could also have reasonably concluded that the snowplow blades defendant converted belonged to Jursik on the basis of state trooper Christopher Youngblood's testimony. Officer Youngblood testified that during his interrogation of defendant, defendant admitted that he had met Travis at Jursik's warehouse and given him snowplow blades belonging to Jursik. Furthermore, Officer Youngblood stated that the serial numbers of snowplow blades recovered from Travis matched the serial numbers of snowplows from Jursik's inventory. Therefore, viewing this testimony in the light most favorable to the prosecution, we conclude that sufficient evidence supported defendant's embezzlement convictions.

Defendant finally raises two sentencing issues. Defendant first contends that the trial court neglected to establish on the record the existence of his three prior convictions, and therefore erroneously imposed an enhanced habitual offender sentence. However, defense counsel acknowledged on the record the accuracy of the presentence information report prepared in this case, which contained information regarding defendant's three prior felony convictions and reflected that defendant had received for his most recent felony conviction an enhanced sentence as a third habitual offender. Because a defendant may not waive objection to an issue before the trial court and then raise it as error in this Court, we conclude that defendant has waived this issue. *People v Fetterley*, ___ Mich App ___; ___ NW2d ___ (released 5/8/98), slip op p 4.

Defendant also argues that the judgment of sentence entered by the trial court incorrectly lists the trial court's finding that defendant qualified as a fourth habitual offender as a fourth habitual "conviction." Defendant insists that MCL 769.13; MSA 28.1085 was drastically altered

by 1994 amendments that no longer permit a habitual offender conviction. The Legislature did in 1994 substantially alter the procedure for enhancing an habitual offender's sentence. *People v Zinn*, 217 Mich App 340, 345; 551 NW2d 704 (1996). However, defendant's argument fails to consider that Michigan courts have long recognized that habitual offender sentence enhancements do not constitute substantive crimes, but mere sentence enhancement mechanisms. *Id*., citing *In re Jerry*, 294 Mich 689, 692; 293 NW 909 (1940); *People v Anderson*, 210 Mich App 295, 297-298; 532 NW2d 918 (1995). See also *People v Bewersdorf*, 438 Mich 55, 67; 475 NW2d 231 (1991); *People v Conner*, 209 Mich App 419, 426; 531 NW2d 734 (1995); *People v Derbeck*, 202 Mich App 443, 447; 509 NW2d 534 (1993). The trial court never indicated at sentencing that it intended to impose a substantive conviction of habitual offender status on defendant, but merely typed the habitual offender charge and "conviction" on the judgment of sentence, underneath the two substantive embezzlement charges. The trial court's finding that defendant qualified as a fourth habitual offender did not constitute a substantive conviction, and we conclude that defendant's argument is without merit.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage